

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 627 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS and  
MR.JUSTICE A.M.KAPADIA

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

-----  
STATE OF GUJARAT

Versus

AHER MERAG KANA

-----  
Appearance:

MR MA BUKHARI APP for appellant - State  
MR YOGESH S LAKHANI for Respondent No. 1, 2

-----  
CORAM : MR.JUSTICE K.R.VYAS and  
MR.JUSTICE A.M.KAPADIA  
Date of decision: 10/02/99

ORAL JUDGEMENT (Per A.M. Kapadia, J.):

1. State of Gujarat, feeling aggrieved by the judgment and order dated 13.5.1991 recorded in Sessions Case No. 64 of 1990 by learned Additional Sessions Judge, Jamnagar, acquitting respondents of the offence punishable under Section 302 read with section 34 of the Indian Penal Code ('IPC' for short hereinafter) and under

Section 135 of the Bombay Police Act, has knocked the doors of this Court by filing this appeal under the provisions of Section 378 of the Code of Criminal Procedure, 1973 ('the Code' for short hereinafter).

2. Basic facts which are required to be stated for the disposal of this appeal are that:

2.1. On 8.5.1990, in the morning at about 8 A.M., complainant, P.W.10, Naran Vejanand, in company of deceased Mulubhai Jivabhai, was going to the office of Mamlatdar, Kalyanpur, for the purpose of verifying the entries made in respect of the land belonging to his father, in the revenue record and deceased was also having a matter in the office of Mamlatdar. They reached Kalyanpur at about 11.00- 11.15 A.M. From there, while they were proceedings towards the house of Gaurishanker Harilal, Talati-cum-Mantri and when they reached near State Bank of Saurashtra, respondents/ original accused Nos.1 and 2 came from behind. Respondent No.1/ original accused No.1 was having a hockey stick in his hands and respondent No.2/ original accused No.2 was having a knife in his hands. Accused No.1 gave a blow with the hockey stick on the head of Mulubhai while accused No.2 gave knife blows, one after another, on the abdomen, head and waist of Mulubhai. Thereafter accused No.1 also gave knife blows to Mulubhai. At that time the frightened complainant was standing near the incident. In the meantime, many people gathered there and they shouted not to beat the injured. In spite of that both the accused continued to inflict blows on Mulubhai. When the complainant tried to go near the accused, both of them turned towards him and chased him with hockey stick and knife. The complainant, therefore, went to the bus stand and searched whether he could see any of his acquaintance there but he could not find anyone. He, therefore, hired a rickshaw and went to the place where Mulubhai was lying. In the rickshaw, he took Mulubhai to Kalyanpur Civil Hospital, where the person who was present advised him to take the injured either to Khambhalia or Jamnagar. The complainant took the Ambulance of Civil Hospital, Kalyanpur and in it he shifted the injured to Bhatia village where he met Meshurbhai Nathubhai Gojia, a person known to him and informed him about the incident. Meshurbhai Nathubhai, Sarpanch Deva Vira and Naran Raide accompanied the complainant in the ambulance and took injured Mulubhai to Khambhalia hospital. On reaching Khambhalia Hospital, the doctor who was present there declared Mulubhai dead.

2.2. The complainant informed Khambhalia Police

Station about the incident and lodged complaint. As the crime was committed at Kalyanpur, Head Constable Indrasinh Jethva of Khambhalia Police Station informed about the said complaint to Kalyanpur Police Station, on telephone and also sent the said complaint through Police Constable to Kalyanpur. Entry was made about the complaint and investigation was put into motion by Kalyanpur Police Station.

2.3. In the meantime, a complaint also came to be lodged by both the accused, at Kalyanpur Police Station, in respect of alleged beating given to them. Police Sub Inspector of Kalyanpur Police Station arrested both the accused on suspicion under the provisions of Section 41 (1) (a) of the Code by drawing a panchnama of their person. He thereafter recovered clothes put on by both the accused as they were found stained with blood, after preparing a panchnama. Panchnama of the scene of offence was also prepared. From the scene of offence, earth which was stained with blood and sample control earth was also recovered. A Hero Honda motor cycle which was lying there was also recovered. The investigating officer interrogated both the accused who were under arrest. As both of them declared their willingness to show muddamal weapons which they used for commission of the crime, panchnama under Section 27 of the Indian Evidence Act was prepared and the muddamal articles i.e., hockey stick and knife, were recovered at the instance of the accused in presence of panchas. Thereafter statements of the persons residing in the near vicinity were also recorded. The accused were sent to Government Hospital, Kalyanpur for taking blood sample. Recovered muddamal articles were sent to Forensic Science Laboratory for analysis and report. On receiving report from Forensic Science Laboratory and autopsy report, both the accused were charge-sheeted for the commission of the aforesaid crime. On completion of investigation, both the accused were charge-sheeted for the commission of the alleged offences.

2.4. On committal both the accused were tried by learned Additional Sessions Judge, Jamnagar in Sessions Case No. 64 of 1990. The learned trial Judge framed charge to which they pleaded not guilty and claimed to be tried contending that they were wrongly and falsely implicated because of previous rivalry.

2.5. In order to bring home the charge levelled against the accused, prosecution has examined in all 32 witnesses, including complainant, medical witnesses and investigating officer. Both the accused in their further

statement recorded under sections 313 of the Code, denied the prosecution allegation and reiterated that they were falsely involved in the crime and they have not committed any crime.

2.6. On appreciation and evaluation of the entire testimonial collection, learned trial Judge came to the conclusion that all the witnesses examined by the prosecution have not supported prosecution case and, therefore, the only witness - complainant whose evidence is also not clinching and does not inspire confidence and, therefore, by relying on the said piece of evidence without getting any corroborations it is unsafe to base conviction and, therefore, he recorded finding of acquittal. Being aggrieved by the said judgment and order, the State has now come before us by way of this appeal.

3. Mr. M.A. Bukhari, learned A.P.P., after taking us through the entire testimonial collection, submitted that though the witnesses, including eye-witnesses and panch witnesses except complainant, have turned hostile, that fact by itself is not fatal to the prosecution case because evidence of complainant, P.W.10, Naranbhai, who was very much present at the relevant time as deceased was in his company throughout till he succumbed to injuries, is very clear and the culpability of the accused could be proved from his evidence, and, therefore, according to him, by not placing reliance on the evidence of the complainant, the learned trial Judge has committed a grave error. Besides this, according to Mr. Bukhari, learned trial Judge has also committed grave error in not considering his complaint as FIR which is on record at mark 26/1 as FIR, on the ground that prior to this, an information had already been received from Head Constable Indrasinh of Khambhalia Police Station by Kalyanpur Police Station and entry to this effect was also made in the register as per Ex.55. He further submitted that the learned trial Judge has also committed grave error in holding that not only the complaint was filed at a belated stage but the same was sent to the concerned Magistrate under Sections 157 of the Code very late. According to him, it is true that complaint was filed at a belated stage. But, he submitted that the complainant was all throughout busy in arranging for the treatment of the injured and after the injured was declared dead he immediately rushed to the police station and lodged the complaint. Therefore, according to him, delay is sufficiently and properly explained by the prosecution. He further submitted that the complainant's evidence is so clear that it does not

require corroboration from the evidence of any witness, however, it gets corroboration from medical evidence. He further submitted that the judgment and order passed by learned trial Judge acquitting the respondents/original accused is bad in law as it is not based on proper appreciation of evidence on record. He, therefore, prayed that the impugned judgment and order requires to be quashed and set aside holding that both the accused, in furtherance of their common object, came at the place of the alleged offence with hockey stick and knife and inflicted injuries to Mulubhai simultaneously and murdered him and, therefore, both of them are guilty of the offence punishable under section 302 read with Sections 34 of IPC and they may be punished in accordance with law.

4. In counter submission, Mr. Lakhani, learned advocate for the respondents, with all vehemence at his command, submitted that the prosecution has miserably and utterly failed to prove the charge levelled against the accused. According to him, evidence of the complainant does not inspire confidence and it creates doubt about his presence at the place of incident. Moreover, his evidence does not get corroboration either from the complaint or from the evidence of independent witnesses including the persons who accompanied him in ambulance from Bhatia to Jamkhambhalia. He further submitted that the complaint lodged by him which is produced at mark 26/1 was rightly not treated as FIR by the learned trial Judge as it has the value of a mere statement before police under Section 162 of the Code as prior to that, intimation about the commission of the crime came to be recorded on the basis of a telephonic message received from Khambhalia Police Station by Kalyanpur Police Station and entry to that effect was made in the register, copy whereof is produced at Ex.55.

5. According to Mr. Lakhani, the motive of the said crime was also not established by the prosecution. In fact, on the fateful day, the complainant had no work in the office of Talati-cum-Mantri of Kalyanpur as is evident from the testimony of Gaurishanker who was the Talati-cum-Mantri at the relevant time. In view of the aforesaid state of affairs of the evidence runs further submission that in fact there is no evidence against the present respondents/original accused and, therefore, according to him, the learned trial Judge has very rightly recorded the acquittal in favour of both the accused which does not warrant any interference by this Court.

6. At this stage, it must be appreciated that so far as homicidal death of Mulubhai is concerned, the prosecution has examined P.W. 1, Dr. Bharatkumar Bhailalbai, at Ex.9, who has performed autopsy. According to him, Mulubhai died a homicidal death. So far as homicidal death of Mulubhai is concerned, it is not disputed by the defence. Therefore, we need not elaborately discuss the evidence of Dr. Bharatkumar as homicidal death of Mulubhai is proved.

7. It may be appreciated that the prosecution has examined as many as 32 witnesses and out of them 10 are eye witnesses i.e., P.W.3, Girdhar Trikam, Ex.18, P.W.4, Pragji Trikam, Ex.19, P.W.5, Dilipsinh Umedsinh, Ex.20, P.W.6, Maheshkumar Vajirbhai, Ex.21, P.W.8, Prabhulal Chandulal, Ex.23, P.W.9, Gaurishanker Harilal, Ex.24, P.W.12, Jaipal Dineshkumar Ramjibhai Ex.28, P.W.13, Laxmidas Kanjibhai Radia Ex.29, P.W.14, Bhikhubha Sardarsinh, Ex.32 and the complainant P.W.10, Naran Vejanand, Ex.26. But none except the complainant, who, according to the prosecution, went in company of the deceased, has supported the case of prosecution. We, therefore, neither deem it expedient nor imperative to discuss the evidence of all the eye witnesses except the complainant, P.W.10, to burden the judgment. However, while discussing evidence of star eyewitness i.e., complainant, we may refer the evidence of other witnesses whenever necessary.

8. We are very much conscious about the aspect as to what is the value of evidence of a witness who has turned hostile. The Honourable Supreme Court has considered this aspect in several decisions. It is very well settled proposition of law that to give permission to prosecutor to cross-examine his own witness thus characterising him as hostile witness that fact does not completely efface or wash off his evidence. Evidence remains admissible in law and there is no legal bar to base conviction upon the testimony of a hostile witness, if corroborated by other reliable evidence.

9. It is a settled legal proposition that testimony of solitary eye witness, even without any corroboration to it, is sufficient to base conviction if his evidence is trustworthy, untainted, unimpeachable and inspires confidence.

10. In this backdrop of the settled legal proposition, we may now advert to the evidence of the eye witness, P.W.10, Naranbhai - the complainant, whose evidence is recorded at Ex.26.

11. It may be appreciated that during the examination-in-chief, he has testified similar version as was narrated in his written complaint lodged before Khambhalia Police Station which was ultimately transferred to Kalyanpur Police Station. However, the same was not considered as FIR by the learned trial Judge and not exhibited but simply placed at mark 26/1.

12. He was cross-examined at length with respect to his family background and mutation entry. He has, inter alia, testified that he does not remember as to when the application was given for change of name in the revenue record. Likewise, he does not know who has given the application. He was cross-examined at length with respect to his presence at the relevant time in company with the deceased at the place of the alleged offence. It may be appreciated that he could not withstand the test of cross-examination. Not only that the Talati-cum-Mantri of Kalyanpur, P.W.9, Gaurishanker, Ex.24, has denied that on the day of the incident, the complainant had any work with him nor he has given any time to him, and in company of the deceased, came to his residence. Therefore, cloud of suspension gathered around his evidence so far as the reason for the presence of the complainant in company of the deceased at the relevant time at Kalyanpur.

13. He has further testified that after the incident of assault on the deceased was over, the complainant went to Civil Hospital, Kalyanpur where the doctor has advised him to take the injured to the hospital either at Khambhalia or Jamnagar. Therefore, according to the complainant, he took and himself drove the ambulance of Government Hospital, Kalyanpur, in which the injured Mulubhai was shifted to Khambhalia Government Hospital and on the way, he halted at Bhatia where he met Meshurbhai Nathubhai, Sarpanch Deva Vira and Naran Raide. In this regard, prosecution has not recorded statement of the concerned doctor of Kalyanpur Civil Hospital as to how the complainant was put in charge of the ambulance of Kalyanpur Civil Hospital. The witnesses whom the complainant allegedly met at Bhatia have also not supported his version. Prosecution has examined Meshurbhai and Naran Raide as prosecution witnesses but they have not supported the prosecution case and, therefore, the prosecution has declared them hostile. In this regard, therefore, no corroboration to the evidence of the complainant is forthcoming. Both the aforesaid witnesses have given contrary version as according to them, Naranbhai had not come to them nor informed about

the alleged incident. Therefore, on this aspect also the complainant's evidence does not get corroboration. Not only that, according to the prosecution case, the complainant took the injured to Kalyanpur Civil Hospital in the auto rickshaw of P.W. 15, Devsi Naran, whose oral testimony is recorded at Ex.33, but he has also not supported the prosecution case. Therefore, the complainant's evidence does not get any corroboration on the aspect of having taken the injured in the auto rickshaw to Kalyanpur Civil Hospital. Prosecution also has placed reliance on the evidence of witnesses who gathered at the scene the alleged incidence. Out of them, one was Branch Manager of State Bank of Saurashtra and another was Chowkidar of the said Bank. Both of them have not given evidence in support of the prosecution version. In short, none of the witnesses assembled at the scene of the alleged offence and according to the prosecution saw the incident of assault on the deceased, have supported the prosecution version. Therefore, looking from any angle, the evidence of the complainant does not get any corroboration. Suffice it to say that the witnesses, i.e., prosecution witnesses to the alleged occurrence, panch witness of discover panchnama all have turned hostile. Therefore, the effort of the prosecution to get corroboration from the circumstantial evidence also went in vain.

14. According to us, the learned trial Judge has very rightly not accepted complaint mark 26/1, which was lodged by the complainant, as FIR because according to the learned trial Judge, prior to that one incident with respect to the said crime was already communicated on telephone by Indrasinh Jethva of Khambhalia Police Station and the same was received by Police Station Officer at Kalyanpur. The said message was entered into the register vide entry No.12 and a copy thereof is produced at Ex.55. On the basis of that message, commission of crime was already recorded, which was first in point of time, and investigation was put into motion.

15. The learned trial Judge has also observed that the said complaint mark 26/1 was recorded at a belated stage i.e., 9 hours after the alleged incident and after the injured succumbed to the injuries. There was no reason for the complainant to wait for such a long time. He had ample opportunity to lodge the complaint at Kalyanpur when he took the injured to Civil Hospital as the police Station, Kalyanpur, is within the immediate vicinity of the Hospital. Subsequently, when he went to Bhatia, he could have lodged the complaint there, as a police chowky was very much there. However, for the



reasons best known to him, he lodged the complaint at Khambhalia Police Station and that too after the death of the injured Mulubhai and after the inquest report and autopsy was over. The prosecution could not explain why there was delay in lodging the complaint though it made feeble submission that the complainant was busy in arranging for the treatment the injured. However, the learned trial Judge has very rightly not accepted the explanation as there was ample opportunity to the complainant to lodge the complaint immediately after the incident.

16. Legal position is that when the complaint mark 26/1 was not accepted as FIR then it assumes only the value of a statement under Section 162 of the Code which can be used for corroboration or contradiction. The said witness was cross-examined at length and from his cross-examination contradictions were brought on record.

17. On the overall consideration of the evidence of the sole eye witness, the learned trial Judge has very rightly held that his evidence cannot be said to be trustworthy and reliable as it does not get any corroboration and such an evidence cannot be the base for conviction.

18. From the complainant's evidence, following aspects can be highlighted:

- a) Homicidal death of injured Mulubhai is proved.
- b) Complainant is an infirm witness. His evidence does not get corroboration either from the evidence of eye witness or from panch witness.
- c) There is no sufficient explanation forthcoming for lodging complaint late by 9 hours and sending the same to Magistrate also at a belated stage.
- d) Complaint mark 26/1 is not the FIR but it is merely a statement under Section 162 of the Code.
- e) None of the alleged eye witnesses as well as panch witnesses supported the prosecution version. Therefore, complainant's evidence does not get any corroboration on all aspects.
- f) Complainant's evidence is very much doubtful and clouds of doubt gathered around it. Therefore no reliance can be placed on his testimony to base conviction.

19. In view of the aforesaid state of affairs of the evidence, we are of the view that the learned trial Judge was right in disbelieving the complainant's evidence. Even the circumstantial evidence, i.e., discovery panchnama also does not support the complainant's version. Therefore, there is no evidence worth the name to connect the accused with the commission of the alleged crime. According to us, no conclusion other than the one arrived at by the learned trial Judge is possible in the facts and circumstances of the case and hence the judgment and order passed by learned trial Judge does not require any interference at the hands of this Court but it requires confirmation.

20. Moreover, this is an acquittal appeal in which Court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly, when the evidence has not inspired confidence of the learned trial Judge. As this Court is in general agreement with the view expressed by the learned trial Judge, it is not necessary for this Court either to reiterate the evidence of the prosecution witnesses or to restate reasons given by the learned trial Judge for acquittal and in our view, expression of general agreement with the view taken by the learned trial Judge would be sufficient in the facts of the present case for not interfering with the judgment of the learned trial Judge and this is so, in view of the decisions rendered by the Hon'ble Supreme court in the case of Girija Nandini Devi and others v. Bijendra Narain Chaudhari, AIR 1967 SC 1124 and State of Karnataka v. Hema Reddy and another, AIR 1981 SC 1417. On overall appreciation of evidence, this court is satisfied that there is no infirmity in the reasons assigned by the learned trial Judge for acquitting the respondents/ original accused. Suffice it to say that the learned trial Judge has given cogent and convincing reasons for acquitting the respondents/ original accused and the learned A.P.P. has failed to dislodge the reasons given by the learned trial Judge and convince this Court to take a view contrary to the one taken by the learned trial Judge. Therefore, there is no merits in the acquittal appeal.

21. In view of our above observation and discussion, there is no merit in the appeal filed by the State. Hence, it is dismissed. The respondents/accused are on

bail. Therefore, their bail bonds shall stand cancelled  
and sureties are discharged.

----

(karan)